

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA, a foreign
insurance company,

Plaintiffs,

v.

RUBENSTEIN'S CONTRACT CARPET,
LLC, a Washington Limited Liability
Corporation; NORTH AMERICAN
TERRAZZO, INC., a Washington
Corporation,

Defendants.

No. 2:19-cv-1175

**COMPLAINT FOR
DECLARATORY RELIEF
(28 U.S.C. § 2201)**

Plaintiff Travelers Property Casualty Company of America (Travelers) submits the following Complaint for Declaratory Relief pursuant to 28 U.S.C. § 2201 and Fed.R.Civ.P. 57.

I. PARTIES

1.1 Plaintiff Travelers is a foreign insurer organized under the laws of the State of Connecticut with its principal place of business in the State of Connecticut.

1.2 Defendant Rubenstein's Contract Carpet, LLC (RCC) is a limited liability company organized under the laws of the State of Washington, with its principal place of

1 business in the State of Washington. All members of RCC are citizens of the State of
2 Washington.

3 1.3 Defendant North American Terrazzo, Inc. (NAT), is a corporation organized
4 under the laws of the State of Washington, with its principal place of business in the State of
5 Washington.

6 **II. JURISDICTION AND VENUE**

7 2.1 Jurisdiction is properly before this Court pursuant to 28 U.S.C. §1332, *et. seq.*,
8 as complete diversity exists among the parties and the amount in controversy exceeds \$75,000.

9 2.2 The Court has jurisdiction over this declaratory judgment action pursuant to
10 28 U.S.C. § 2201 because there is an actual and justiciable controversy between the parties with
11 respect to the existence of insurance coverage under the policies of insurance issued by
12 Travelers. A judicial determination and declaration of the rights and obligations of the parties is
13 necessary and appropriate at this time because Travelers has no adequate remedy at law which
14 will resolve the current controversy.

15 2.3 Venue is proper in this Court pursuant to 28 U.S.C. § 1391 as this action
16 involves a dispute over the application of insurance coverage under policies written out of
17 Washington, events and omissions which gave rise to this claim occurred in this district, and
18 because NAT and RCC are subject to this Court's personal jurisdiction.

19 **III. FACTUAL BACKGROUND**

20 3.1 The subject claim arises from construction at the 13 Coins Restaurant located in
21 Seattle, Washington.

22 3.2 On or about October 2, 2017, Sodo Builders, LLC (SODO), the general
23 contractor for the subject project, entered into written contracts with RCC and NAT to perform

1 original construction of the floors of the Restaurant. The subcontract required the parties to
2 perform their work in strict compliance with the Main Contract and incorporated the terms and
3 conditions of the Main Contract.

4 3.6 RCC and NAT agreed in the subcontract “to provide all necessary supervision,
5 management, services, engineering, testing, materials, labor, supplies, attachments, equipment,
6 plant sundries, appurtenances, and/or any necessary thing required to diligently and fully
7 perform and complete all Flooring and Finishes Works, in strict compliance with the
8 SUBCONTRACT DOCUMENTS. All work shall be performed in accordance with the
9 applicable manufacturer’s instructions and industry best practices unless in conflict with the
10 SUBCONTRACT DOCUMENTS.”

11 3.7 During original construction, RCC and/or NAT purchased and installed flooring
12 pursuant to the Subcontract at 13 Coins Restaurant.

13 3.8 On January 26, 2018, RCC and/or NAT provided SODO a Guarantee of Work
14 verifying that NAT had performed all work in accordance with the Plans and Specifications for
15 the carpet installation, Resinous Epoxy Flooring, and the Stained Concrete. Further RCC
16 and/or NAT guaranteed their “work to be free from defects in workmanship or material for a
17 period of one year from the date of substantial completion (February 9, 2018) and that it would
18 make good without delay, any defects without additional costs to Owner, and agree to pay for
19 any expense, including Attorney’s fees, Architect and/or Owner cost, if incurred, as a result
20 from correcting guaranteed work.” SODO and 13 coins paid RCC and/or NAT approximately
21 \$119,689 for the flooring.

22 3.9 On or about July 2018, SODO and 13 Coins alerted RCC and NAT that there
23 were alleged problems with their work. SODO notified RCC and NAT that the floor at 13

1 Coins was allegedly failing in four location (1) Main breakfast bar cook line; (2) Main
2 breakfast bar pantry area; (3) Upstairs dishwashing area; (4) Downstairs kitchen area. SODO
3 alerted RCC and NAT that the alleged floor failure was due to faulty material and/or incorrect
4 installation.

5 3.10 On September 2, 2018, NAT, 13 Coins, and SODO met and discussed a plan to
6 move forward and correct the alleged defects. RCC and NAT allegedly failed to follow up on
7 this meeting.

8 3.11 On September 5, 2018, SODO sent RCC and NAT written notice of the alleged
9 failures asking for a meeting to resolve the issues within 20 working days.

10 3.12 On September 24, 2018, SODO sent RCC and NAT written Notice of
11 Unsatisfactory Performance with photographs of the alleged failure as examples asking for a
12 response by September 26, 2018.

13 3.13 On or about the end of December 2018 or beginning of January 2019, RCC and
14 NAT agreed to dismantling of the kitchen on or about January 7, 2019 and for repair work for
15 the floors to begin shortly thereafter.

16 3.14 In reliance on RCC and NAT's representation, SODO incurred costs to
17 dismantle the 13 Coins Restaurant incurring costs to allow NAT to replace the defective
18 flooring. SODO alleges that it incurred at least \$181,548.71 in costs to prepare 13 Coins for
19 the warranty replacement by RCC and NAT while allowing 13 Coins to remain partially open
20 for business.

21 3.15 In addition, 13 Coins Restaurant service was allegedly disrupted and it claims to
22 have lost revenue during the replacement of the floors by NAT.

23 3.16 On December 3, 2018, RCC and NAT sent correspondence to insurance broker

1 Dick Davis, stating as follows:

2 Dick,

3 Want to advise of a potential claim on a project we did at the new
4 13 Coins restaurant in the 255 Building adjacent to the Century
5 Link Field. It involves a failure of the epoxy flooring in the
6 kitchen, and is in the range of \$400k-\$500k including replacement
7 materials and labor, removal and replacement of kitchen
8 equipment, HVAC, and lost business.

9 Please advise what we need to do at this point.

10 Randy Rubenstein.

11 3.17 On December 4, 2018, NAT and RCC tendered the 13 Coins Restaurant loss to
12 Travelers. Travelers promptly acknowledged receipt of the claim and began its coverage
13 investigation.

14 IV. POLICIES OF INSURANCE

15 A. Identification of the Subject Insurance Policy

16 4.1 Travelers issued a commercial general liability insurance policy to NAT and
17 RCC under policy number Y-630-6F055289-TIL-18 for the one-year period of March 15, 2018
18 to March 15, 2019 (“the Subject Policy”).

19 B. Provisions of The Subject Policy

20 4.2 The Commercial General Liability coverage part contained in the Subject Policy
21 contains the following Insuring Agreement:

22 SECTION I -COVERAGES 23 COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes
legally obligated to pay as damages because of
“bodily injury” or “property damage” to which this

insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sum or perform acts or services is covered unless explicitly provided for under Supplementary Payments Coverages A and B.

b. This insurance applies to “bodily injury” and “property damage” only if:

- (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;
- (2) The “bodily injury” or “property damage” occurs during the policy period;
- (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, knew that the “bodily injury” or “property damage” had occurred, in whole or in part. If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change or resumption of such “bodily injury” or “property damage” during or after the policy period will be

deemed to have been known prior to the policy period.

- c. “Bodily injury” or “property damage” which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. Of section II – Who is an Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim, includes any continuation, change or presumption of that “bodily injury” or “property damage” after the end of the policy period
- d. “Bodily injury” or “property damage” will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim:
 - (1) Reports all, or any part, of the “bodily injury” or “property damage” to us or any other insurer;
 - (2) Receives a written or verbal demand or claim for damages because of the “bodily injury” or “property damage”; or
 - (3) Becomes aware by any other means that “bodily injury” or “property damage” has occurred or has begun to occur.

...

CG 00 01 10 01, p. 1.

4.3 The Subject Policy contain the following definitions that are applicable to the foregoing Insuring Agreement.

SECTION V – DEFINITIONS

...

- 13. “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

...

- 17. “Property damage” means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

"Property damage" does not include loss or damage to "electronic media and records".

...

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

CG 00 01 10 01, pp.14-15, as modified by CG D2 56 11 03.

4.4 The Subject Policy contains the following exclusions and applicable definitions:

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed by you in an

"insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured will be deemed to be damages because of "bodily injury" or "property damage", provided that:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

CG 00 01 10 01, p. 2.

SECTION V – DEFINITIONS

9. "Insured contract" means:

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement....

CG 00 01 10 01, p. 13.

j. Damage To Property

"Property damage" to:

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

- 1 (6) That particular part of any property that must be
2 restored, repaired or replaced because "your work"
3 was incorrectly performed on it.

4 ...

5 Paragraph (6) of this exclusion does not apply to
6 "property damage" included in the "products completed
7 operations hazard".

8 CG 00 01 10 01, p. 4-5.

9 **SECTION V – DEFINITIONS**

10 ...

11 **16. "Products-completed operations hazard":**

- 12 **a.** Includes all "bodily injury" and "property damage"
13 occurring away from premises you own or rent and
14 arising out of "your product" or "your work" except:

15 **(1)** Products that are still in your physical
16 possession; or

17 **(2)** Work that has not yet been completed or
18 abandoned. However, "your work" will be
19 deemed completed at the earliest of the
20 following times:

21 **(a)** When all of the work called for in
22 your contract has been completed.

23 **(b)** When all of the work to be done at
the job site has been completed if
your contract calls for work at more
than one job site.

(c) When that part of the work done at a
job site has been put to its intended
use by any person or organization
other than another contractor or
subcontractor working on the same
project.

Work that may need service, maintenance,
correction, repair or replacement, but which

is otherwise complete, will be treated as completed.

CG 00 01 10 01, p. 14.

k. Damage To Your Product

“Property damage” to “your product” arising out of it or any part of it.

CG 00 01 10 01, p. 5.

l. Damage To Your Work

“Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard”.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a sub-contractor.

CG 00 01 12 04, p. 5.

m. Damage To Impaired Property Or Property Not Physically Injured

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

CG 00 01 12 04 p. 5.

SECTION V – DEFINITIONS

...

1
2 **8.** “Impaired property” means tangible property, other than
3 “your product” or “your work”, that cannot be used or is
4 less useful because:

5 **a.** It incorporates “your product” or “your work” that
6 is known or thought to be defective, deficient,
7 inadequate or dangerous; or

8 **b.** You have failed to fulfill the terms of a contract or
9 agreement;

10 if such property can be restored to use by:

11 **a.** The repair, replacement, adjustment or removal of
12 “your product” or “your work”; or

13 **b.** Your fulfilling the terms of the contract or
14 agreement.

15 ...

16 **21.** “Your Product”:

17 **a.** Means:

18 **(1)** Any goods or products, other than real
19 property, manufactured, sold, handled,
20 distributed or disposed of by:

21 **(a)** You;

22 **(b)** Others trading under your name; or

23 **(c)** A person or organization whose
 business or assets you have
 acquired; and

 ...

b. Includes:

(1) Warranties or representations made at any
 time with respect to the fitness, quality,
 durability, performance or use of “your
 product”; and

- (2) The providing of or failure to provide warnings or instructions.

...

22. "Your work":

a. Means:

- (1) Work or operations performed by you or on your behalf; and
- (2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and
- (2) The providing of or failure to provide warnings or instructions.

CG 00 01 10 01, p. 13, 15.

n. Recall of Products, Work or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property"

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

CG 00 01 10 01, p. 5.

1 4.5 The Subject Policy also contains the following conditions that may be applicable
2 to the subject claim:

3 **2. Duties In The Event of Occurrence, Offense, Claim Or**
4 **Suit**

5 **a.** You must see to it that we are notified as soon as
6 practicable of an “occurrence” or an offense which
7 may result in a claim. To the extent possible, notice
8 should include:

9 **(1)** How, when and where the “occurrence” or
10 offense took place;

11 **(2)** The names and addresses of any injured
12 persons or witnesses; and

13 **(3)** The nature and location of any injury or
14 damage arising out of the “occurrence” or
15 offense.

16 **b.** If a claim is made or “suit” is brought against any
17 insured, you must:

18 **(1)** Immediately record the specifics of the
19 claim or “suit” and the date received; and

20 **(2)** Notify us as soon as practicable.

21 You must see to it that we receive written notice of
22 the claim or “suit” as soon as practicable.

23 **c.** You and any other insured must:

(1) Immediately send us copies of any demands,
 notices, summonses or legal papers received
 in connection with the claim or “suit”;

(2) Authorize us to obtain records and other
 information;

(3) Cooperate with us in the investigation or
 settlement of the claim or defense against
 the “suit”; . . .

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

e. The following provisions apply to Paragraph **a.** above, but only for purposes of the insurance provided under this Coverage Part to you or any insured listed in Paragraph **1.** Or **2.** Of Section **II** – Who Is An Insured:

(1) Notice to us of such “occurrence” or offense must be given as soon as practicable only after the “occurrence” or offense is known to you (if you are an individual), any of your partners or members who is an individual (if you are a partnership), any of your managers who is an individual (if you are a limited liability company), any of your trustees who is an individual (if you are a trust), any of your “executive officers” or directors (if you are an organization other than a partnership, joint venture, limited liability company of trust) or any employee authorized by you to give notice of an “occurrence” or offense.

CG 00 01 10 01, pp. 10-11, as modified by CG D4 58 07 13, p. 6.

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all the other insurance by the method described in Paragraph **c.** below.

However, if you specifically agree in a written contract or written agreement that the insurance provided to an additional insured under this Coverage Part must apply

on a primary basis, or a primary and non-contributory basis, this insurance is primary to other insurance that is available to such additional insured which covers such additional insured as a named insured, and we will not share with that other insurance, provided that:

- a. The “bodily injury” or “property damage” for which coverage is sought occurs; and
- b. The “personal injury” or “advertising injury” for which coverage is sought arises out of an offense committed subsequent to the signing and execution of that contract or agreement by you.

b. Excess Insurance

This insurance is excess over:

- (1) Any of the other insurance, whether primary, excess, contingent or on any other basis:
 - (a) That is Fire, Extended Coverage, Builder’s Risk, Installation Risk or similar coverage for “your work”;
 - (b) That is Fire insurance for premises rented to you or temporary occupied by you with permission of the owner;
 - (c) That is insurance purchased by you to cover your liability as a tenant for “property damage” to premises rented to you or temporarily occupied by you with permission of the owner; or
 - (d) If the loss arises out of the maintenance or use of aircraft, “autos” or watercraft to the extent no subject to Exclusion g. of Section I – Coverage A – Bodily Injury and Property Damage Liability.
 - (e) That is available to the insured when the insured is added as an additional insured under any other policy,

including any umbrella or excess policy.

When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any “suit” if any other insurer has a duty to defend the insured against that “suit”. If no other insurer defends, we will undertake to do so, but we will be entitled to the insured’s rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

- (1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
- (2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer’s share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

CG 00 01 040 13 at p. 12, as modified by CG D0 37 04 05.

4.6 The Subject Policy also contains an endorsement that provides as follows:

**AMENDMENT- NON CUMULATION OF EACH
OCCURRENCE LIMIT OF LIABILITY and NON
CUMULATION OF PERSONAL and ADVERTISING
INJURY LIMIT**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

1. Paragraph 5 of SECTION III - LIMITS OF INSURANCE, is amended to include the following:

Non cumulation of Each Occurrence Limit - If one "occurrence" causes "bodily injury" and/or "property damage" during the policy period and during the policy period of one or more prior and/or future policies that include a commercial general liability coverage part for the insured issued by us or any affiliated insurance-company, the amount we will pay is limited. This policy's Each Occurrence Limit will be reduced by the amount of each payment made by us and any affiliated insurance company under the other policies because of such "occurrence".

...

CG D2 03 12 97.

- 4.7 The Subject Policy also contains an endorsement that provides as follows:

- B. If we initially defend and insured ("insured") or pay for an insured's ("insured's") defense but later determine that none of the claims ("claims"), for which we provided a defense or defense costs, are covered under this insurance, we have the right to reimbursement for the defense costs we have incurred.

The right to reimbursement under this provision will only apply to the costs we have incurred after we notify you in writing that there may not be coverage and that we are reserving our rights to terminate the defense or payment of defense costs and to seek reimbursement for defense costs.

IL 01 23 11 13.

1 4.8 In accordance with applicable law, Travelers now brings this claim for
2 Declaratory Judgment seeking a judicial determination that it does not owe any coverage
3 obligation to NAT or RCC for the claims asserted in the 13 Coins Restaurant claim.

4 **V. NO INDEMNITY OR DEFENSE COVERAGE UNDER THE POLICIES**

5 5.1 The Policies provide coverage only for “property damage” caused by an
6 “occurrence”, as those terms are defined by the Policies, provided that any such “property
7 damage” occurs during the policy period and NAT nor RCC did not know, in whole or in part,
8 about the alleged “property damage” prior to the inception of any applicable policy period.

9 5.2 There is an actual and justiciable controversy as to whether the claims against
10 NAT and RCC involve claims for “property damage” as that term is defined.

11 5.3 There is an actual and justiciable controversy as to whether of the claims against
12 NAT and RCC involve an “occurrence” as that term is defined by the Subject Policy.

13 5.4 There is an actual and justiciable controversy as to whether the alleged liability
14 of NAT and RCC is for “property damage” caused by any covered “occurrence.”

15 5.5 There is an actual and justiciable controversy as to whether any “property
16 damage” that was allegedly caused by a covered “occurrence” occurred during any policy
17 period.

18 5.6 There is an actual and justiciable controversy as to whether NAT and RCC had
19 knowledge, in whole or in part, of any alleged “property damage” prior to the inception of the
20 policy periods.

21 5.7 Pursuant to the Subject Policy, coverage is excluded for liability for “property
22 damage” to that particular part of real property on which an insured or its contractors or
23 subcontractors worked directly or indirectly for the insured’s operations if the “property

1 damage” arose out of those operations.

2 5.8 There is an actual and justiciable controversy as to whether the claims against
3 NAT and RCC involve liability for “property damage” to that particular part of real property on
4 which NAT and RCC, or its contractors or subcontractors, worked directly or indirectly for its
5 operations and if said “property damage” arose out of those operations.

6 5.9 Pursuant to the Subject Policy, coverage is excluded for liability for “property
7 damage” to the insured’s “your product”.

8 5.10 There is an actual and justiciable controversy as to whether the claims against
9 NAT and RCC involve liability for “property damage” to NAT’s and RCC’s product.

10 5.11 Pursuant to the Subject Policy, coverage is excluded for liability for “property
11 damage” to the insured’s “your work”.

12 5.12 There is an actual and justiciable controversy as to whether the claims against
13 NAT and RCC involve liability for “property damage” to NAT’s and RCC’s work.

14 5.13 Pursuant to the Subject Policy, coverage is precluded for “property damage” to
15 “impaired property” or other property that has not been physically injured arising out of a
16 defect, deficiency, inadequacy or dangerous condition in the insured’s product or the insured’s
17 work.

18 5.14 There is an actual and justiciable controversy as to whether any alleged
19 “property damage” to any allegedly “impaired property” or other property that has not been
20 physically injured arises out of a defect, deficiency, inadequacy or other dangerous condition in
21 NAT’s and RCC’s work or product.

22 5.15 Pursuant to the Subject Policy, coverage is excluded for “property damage” to
23 “impaired property” or other property that has not been physically injured arising out of a delay

1 or failure by an insured or anyone acting on the insured's behalf to perform a contract or
2 agreement in accordance with the terms of the contract or agreement.

3 5.16 There is an actual and justiciable controversy as to whether any alleged
4 "property damage" to any allegedly "impaired property" or other property that has not been
5 physically injured arises out of a delay caused by NAT or RCC or a failure by NAT and RCC
6 to perform a contract or agreement in accordance with the terms of the contract or agreement
7 related to the Project.

8 5.17 Pursuant to the Subject Policy, coverage is excluded for liability arising from
9 property that must be restored, repaired, or replaced because the insured's work was incorrectly
10 performed on it prior to the completion of the insured's work.

11 5.18 There is an actual and justiciable controversy as to whether the claims against
12 H.D. Fowler involve liability arising from property that must be restored, repaired, or replaced
13 because NAT's or RCC's work was incorrectly performed on it prior to the completion of the
14 insured's work.

15 5.19 Pursuant to the Subject Policy, coverage is excluded for liability arising from
16 damages claimed for any loss, cost or expense incurred by NAT and RCC or others for the loss
17 of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of
18 "your product", "your work", or "impaired property" if such product, work, or property is
19 withdrawn or recalled from the market or from use by any person or organization because of a
20 known or suspected defect, deficiency, inadequacy or dangerous condition in it.

21 5.20 There is an actual and justiciable controversy as to whether the claims against
22 NAT and RCC involve liability for damages claimed for any loss, cost or expense incurred for
23 the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or

1 disposal of “your product”, “your work”, or “impaired property” that has been withdrawn or
2 recalled from the market or from use by any person or organization because of a known or
3 suspected defect, deficiency, inadequacy or dangerous condition in it.

4 5.21 Pursuant to the non-cumulation provisions of the Subject Policy, any payment
5 by Travelers under any policy for any “occurrence” will reduce the limit of each successive
6 policy issued by Travelers by the amount of any such payment for that “occurrence”.

7 5.22 To the extent that a progressive loss alleged, there is an actual and justiciable
8 controversy as to whether any potential coverage available under the Subject Policy would
9 limit Travelers’ obligations to a single policy period.

10 5.23 Pursuant to the Subject Policy, NAT and RCC are required to comply with
11 certain terms and conditions as a condition precedent to coverage.

12 5.24 There is an actual and justiciable controversy as to whether NAT and RCC
13 complied with the cooperation provisions in the Policies and whether any failure to comply on
14 the part of NAT and RCC prejudiced Travelers.

15 5.25 Pursuant to the Subject Policy, an insured may not, except at its own expense,
16 incur any expense or obligation without the consent of Travelers.

17 5.26 Travelers did not consent to NAT and/or RCC incurring any expense or
18 obligation.

19 5.27 There is an actual and justiciable controversy as to whether NAT and/or RCC
20 have voluntarily incurred any expenses or obligation without the consent of Travelers and
21 whether having incurred such expense or obligation may have prejudiced Travelers.

22 5.28 The Subject Policy provides that Travelers is entitled to reimbursement of any
23 defense costs that it incurs for claims that it is ultimately determined are not covered pursuant

1 to the terms and conditions of the Subject Policy.

2 5.29 There is an actual and justiciable controversy as to whether Travelers is entitled
3 to any defense costs that it has incurred or that it may incur in the future in defending claims for
4 which there is no coverage available under the Subject Policy.

5 5.30 Travelers reserves the right to assert any other exclusions or grounds for which
6 coverage for the claims against NAT and RCC may be excluded under the Policies.

7 **VI. CAUSE OF ACTION FOR DECLARATORY RELIEF**

8 6.1 Actual and justiciable controversies exist as to whether any defense coverage is
9 available to NAT and RCC under the Policy as set forth above.

10 6.2 Pursuant to and in accordance with 28 U.S.C. § 2201, Travelers requests that the
11 Court grant declaratory relief in favor of Travelers and enter a judicial determination that
12 Travelers does not have an obligation to provide a defense to NAT and RCC in regard to the 13
13 Coins Restaurant claim.

14 6.3 Actual and justiciable controversies exist as to whether any indemnity coverage
15 is available to NAT and RCC under the Policies in regard to the claims related to the
16 Underlying Lawsuit.

17 6.4 Pursuant to and in accordance with 28 U.S.C. § 2201, Travelers requests that the
18 Court grant declaratory relief in favor Travelers and enter a judicial determination that
19 Travelers does not have an obligation to provide any indemnity coverage to NAT and RCC in
20 regard to the claims arising from the 13 Coins Restaurant claim.

21 6.5 To the extent that there is defense coverage available to NAT and RCC under
22 the Policy, there is an actual and justiciable controversy as to whether such coverage is primary
23 or excess.

1 6.6 To the extent that the Court determines that there is coverage available to NAT
2 and RCC under the Policies, pursuant to 28 U.S.C. § 2201, Travelers requests that the Court
3 grant declaratory relief in favor of it and enter a judicial determination that such coverage is
4 excess over any other coverage provided to NAT and RCC under any other policy of insurance.

5 **VII. PRAYER FOR RELIEF**

6 WHEREFORE, Travelers Property Casualty Company of America having specifically
7 alleged the foregoing, now prays for the following relief:

8 7.1 For a declaration of the rights and obligations of the parties hereto under the
9 Policy.

10 7.2 For a declaration that there is no duty to defend NAT and RCC under the
11 Policy.

12 7.3 For a declaration that there is no duty to indemnify NAT and RCC under the
13 Subject Policy.

14 7.4 For a judicial declaration that NAT and RCC are bound by any judicial
15 declarations in this matter involving the Subject Policy.

16 7.5 To the extent allowed by applicable law, for reimbursement of any and all
17 defense costs, fees, or expenses incurred by Travelers in defending any entity or person in the
18 13 Coins Restaurant claim who claims to be an insured under the Policy for which there is no
19 defense obligation.

20 7.6 For all pre-judgment and post-judgment interest as allowed by applicable law.

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1 7.7 For attorney fees and costs allowed by applicable statute and law.

2 7.8 For other and further relief as the Court deems just and equitable.

3 DATED this 26th day of July, 2019.

4 LEATHER & ASSOCIATES, PLLC

5 *s/ Thomas Lether*

6 *s/ Eric Neal*

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